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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

VAN ROOSEVELT SOLOMON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia properly determined that, under the facts of this case, a limiting charge was not required during the sentencing phase of Petitioner's trial concerning the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7).

2.

Whether the Supreme Court of Georgia properly held that Petitioner's sentence of death was not "excessive or disproportionate" to the penalty imposed in similar cases considering the crime and the defendant.

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PART ONE

STATEMENT OF THE CASE

Petitioner, Van Roosevelt Solomon, was convicted in the Superior Court of Cobb County of murder, following a jury trial on September 24 through 27, 1979. The Petitioner received the death sentence, as the jury found as aggravating circumstances that: (1) the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony; armed robbery and (2) that the offense of murder was outrageously and wantonly vile, horrible, and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim.

Petitioner's motions for new trial were denied by order of the court on February 25, 1980. Petitioner filed a notice of appeal to the Supreme Court of Georgia on March 20, 1980.

On direct appeal to the Supreme Court of Georgia, the Supreme Court found Petitioner's allegations, including his allegation that a limiting charge should have been given to the jury concerning the aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(7), to be without merit. See Solomon v. State, 247 Ga. 27, 34 (1981). Although Petitioner did not specifically raise the issue now presented for this Court's review, i.e., that the infliction of the death penalty upon the Petitioner, absent a finding by the jury that the Petitioner himself has intended to take a life, violates the Eighth and Fourteenth Amendments to the Supreme Court of Georgia, the Supreme Court of Georgia in conducting its mandatory sentence review, found that Petitioner's sentence of death for murder was

not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the Petitioner. Solomon v. State, 247 Ga. 27, 34 (1981).

The evidence produced at trial in the Superior Court of Cobb County, Georgia showed the following:

The victim in this case, Roger Dennis Tackett, was manager of the Tenneco Self Service Station and Convenience Store on Delk Road in Cobb County, Georgia. He was shot to death during an aborted armed robbery by the Petitioner and co-indictee, Wilbur May. Mr. Tackett was discovered, dead from gunshot wounds, in the back room of a store, in the interim between Petitioner's initial arrest for burglary and his actual removal to the police station.

At approximately 1:45 a.m. on June 16, 1979, police officer Kendle drove a Ms. Jill Rhoda to the Tenneco station in order to use the public phone there. (T. 240). Ms. Rhoda had called the police department in an effort to recover her keys from the apartment of a friend and Officer Kendle had responded to her call at 1:24 a.m. at the Palisades Apartments. (T. 239). Officer Kendle met Ms. Rhoda in the parking lot of the apartment and she explained to him that her date had refused to give her the keys to her car and that as he had gone to his apartment, she had to have a girlfriend pick her up and take her home. (T. 239). Officer Kendle took Ms. Rhoda to the Collingwood Apartments where her car was located, but the keys were not there and she could not locate her date's apartment. (T. 239-240). Since she knew the telephone number of her date, Officer Kendle took Ms. Rhoda to a phone booth at the Tenneco station so that she could contact him. (T. 240). Ms. Rhoda corroborated Officer Kendle's explanation of the circumstances leading up to his arrival at the Tenneco station. (T. 219-222).

Ms. Rhoda got out of the car and went to the phone booth at the station. Officer Kendle noticed that Mr. Tackett's car, a green vehicle, was parked with the front door open. Due to the fact that it was approximately 2:00 a.m. and that Officer Kendle knew the store normally closed at 12:00 midnight, he walked over to the store and noticed a black male looking out from the storeroom door. Officer Kendle identified the man he observed at this door as Wilbur May. (T. 242). Officer Kendle entered the store through the unlocked front door and the male shut the door to the storeroom. At this point, Officer Kendle testified that he heard four pops; three quick ones, a pause and then the fourth, but he did not realize what had made the noises which he heard coming out of the storeroom. (T. 243). Officer Kendle drew his gun, yelling "police, come out," but received no response. At this point, both Officer Kendle and Ms. Rhoda testified that Ms. Rhoda came in and Kendle told her to get out. (T. 229, 230, 244).

Officer Kendel opened the door of the storeroom and found two black males, the Petitioner and May. (T. 244). Officer Kendle had the two men place their hands on top of their heads, walk out of the door and lie down on the floor. (T. 245). Officer Kendle inquired as to what they had been doing and Petitioner responded, "burglarizing." (T. 245).

After patting Petitioner and May down and handcuffing Mr. May, Officer Kendle frisked Petitioner. He had previously reported the two burglars. Officer Kendle placed Petitioner in the back seat of the car and noticed that Petitioner was wearing gloves. (T. 246). Officer Kendle then went inside the store and took Mr. May outside of the store. At this point, Mr. Woolard, a local

security guard, drove up to the store. (T. 247). Officer Kendle testified that he called the emergency code number which he found on the store window. He located Petitioner's van, at this point realizing that there might be someone else in the store. (T. 248). While Officer Kendle was on the radio, Mr. Woolard was talking with Mr. May. (T. 249). Having spotted the van, both Officer Kendle and Mr. Woolard realized that someone was in the back room of the store. (T. 249). Mr. Woolard later testified that Mr. May told him that there was a man hurt in the back room. (T. 295). Officer Kendle and Woolard then broke in the back door and discovered the body of Mr. Tackett. (T. 249-250). Officer Kendle testified that he found no pulse, but that Mr. Tackett's body was still warm and that there was a lot of blood around his head. (T. 250).

Officer Kendle testified that he had given Petitioner and Mr. May their Miranda rights while they were lying on the floor. (T. 252). Officer Kendle and Mr. Woolard discovered the body approximately thirty minutes after apprehending Petitioner and May. (T. 255). Two guns were also found at the scene of the murder, located next to the body of the victim. (T. 273). Officer Kendle testified that he did not touch these guns but left the crime scene undisturbed, while waiting on the detectives which he had previously called. (T. 273-274).

The testimony of Mr. Woolard was basically cumulative to that of Officer Kendle. (T. 281-282). Mr. Woolard also identified Mr. May and the Petitioner as being the two suspects who were discovered at the store at this time. Mr. Woolard testified that May admitted to him during a conversation at the scene that there was a man "hurt bad" in the storeroom. (T. 295). Mr. Woolard's testimony corroborated that of Officer Kendle as to their discovery of the van, the victim's body and the guns. (T. 295-309; 311).

Detective Robert Kelley testified as to his arrival at the crime scene in his investigation of the murder, including taking certain photographs and collecting evidence. (T. 329). His testimony corroborated that of Officer Kendle and Mr. Woolard and included photographs and diagrams of the scene which were admitted into evidence. (T. 31, 32, 334). Admitted into evidence were photographs of the guns, the victim and the cash drawer which was found in the cooler area of the back room of the convenience store. (T. 351-358). Detective Kelly identified the guns as being a Colt .35 caliber short which had been fired four times and a Smith and Wesson pistol which had also been fired. (T. 355-356).

Lieutenant Moss, who arrived at 1:30 a.m., corroborated Offider Kendle's testimony that the body of the victim was found in the storeroom of the convenience store. (T. 381). Lieutenant Moss investigated the van which was found near the Tenneco station and inventoried the contents of the van. Articles found in the van were introduced into evidence at Petitioner's trial. (T. 383-385). During the course of his inventory of the van, burglary tools, a holster and bullets were removed from the van, which was identified as being registered to the Petitioner. (T. 384-387).

Upon his arrival at the crime scene at approximately 3:00 a.m., Officer Julian Deal questioned the Petitioner. Officer Deal testified as having given Petitioner his Miranda rights and "swabbing his hands" to test for gunpowder residue. (T. 395). Officer Deal again advised the Petitioner of his Miranda rights once he arrived at the police station. At this point, Officer Deal testified that the Petitioner involutarily told him that he had been tied up and forced into the store, where he was put into the cooler while Mr. May shot the victim, Mr. Tackett. (T. 416-417).

Mr. Kelley took the swabs to the crime lab. (T. 422-423). At the crime lab, Mr. Fite examined the guns and the swabs and identified the guns which were found, as having been used in the crimes. Mr. Fite testified that the bullets were fired from the guns located near the body of the victim. (T. 428-429, 432). Mr. Riddell, the microanalyst at the State Crime Lab, testified as to gunshot residue tests which he performed on the swabs taken from the Petitioner and May. Chemicals were found on both the hand of the Petitioner and Mr. May that indicated that they had fired shots from the guns found at the scene of the crimes. (T. 444-446).

Chief Medical Examiner Doctor Burton testified as to the autopsy he performed on Mr. Tackett. (T. 452). He stated that his examination revealed five gunshot wounds; one wound in the head area, one located in the jaw, another located on the victim's right hip, a fourth located on the victim's right buttock and a fifth located on the victim's left thumb. (T. 456-457). Dr. Burton set out the progression of the wounds through an explanation of the position of the body, the angles at which the bullets had entered the body and the amount that the victim's blood had spattered. His examination revealed that three shots had been fired rather quickly, the first two to the hip, the final to the head of the victim as he was lying on the floor. Dr. Burton testified that the thumb wound had probably been inflicted at an earlier time. (T. 463-470). Therefore, five rounds had been fired into the victim's body. Officer Kelley had determined that the gun used by Mr. May had only been fired four times.

Petitioner Solomon took the stand in his own behalf only during the sentencing phase of the trial, and testified that he had met co-indictee Wilbur May in the first or second week of June, while working for a paint contractor on a house on Northside Drive. (T. 590-595). Petitioner testified that May worked under him on the job the day of their meeting and that when May told the Petitioner that he had no place to stay, Petitioner invited him to spend the night at his house. (T. 596). Petitioner testified that on June 16, the day of the crime, he worked all day and met Mr. May at his house later that day at approximately 7:00 or 8:00 p.m. Petitioner testified that he drove May to various locations where May discussed with various individuals his desire to obtain a gun. (T. 597-600). Petitioner testified that Mr. May obtained two weapons. Finally, Mr. May requested that Petitioner drive him to the Tenneco Station and Convenience Store and Petitioner testified that having let Mr. May out of his van, he pulled across the street from the station and went to sleep in the van. (T. 600).

According to Petitioner, he slept in the van approximately thirty to forty minutes, waking up when May returned to his truck and made him go into the Tenneco station with him. (T. 601). Petitioner testified that Mr. May took him and the victim, Mr. Tackett, into the back room and that May asked Mr. Tackett for money. (T. 601). Petitioner testified that he did not know what it was all about but that he observed Mr. May shot the victim and then he heard the police call out and ask them what they were doing in the back room and tell them that they were under arrest. (T. 601-602).

Petitioner could not explain on cross-examination how his own Smith and Wesson pistol came to be found in the Tenneco store. (T. 616). He stated that he did not tell police about Mr. Tackett lying bleeding in the back room of the store as he was in shock at the time. (T. 613). Although testifying that Mr. May forced him from the van and into the store at gunpoint, Petitioner admitted on cross-examination that he was not tied up at the time that Mr. May shot the victim and stated that he told this to the police because after the incident, ". . . I began to run over my mind that I got to think of something that is going to get out of this." (T. 616).

These facts will be referred to as is necessary for a more thorough illumination of any issue raised by means of this petition for a writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY HELD THAT, UNDER THE FACTS OF THIS CASE, NO LIMITING CHARGE CONCERNING GA. CODE ANN. § 27-2534.1 (b)(7),WAS REQUIRED.

After Petitioner's conviction, a sentencing hearing was held in which various evidence was presented to the jury relative to the penalty which should be imposed pursuant to Petitioner's conviction for the offense of murder. (T. 572-623). The court charged the jury and defined the term "aggravating circumstances" in general. (T. 649-650). He charged on the two specific aggravating circumstances, i.e., those set forth in Ga. Code Ann. § 27-2534.1(b)(2), that the offense of murder was committed while the defendant was engaged in the commission of another capital felony, armed robbery, and Ga. Code Ann. § 27-2534.1(b)(7), that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim. (T. 650-651). He also furnished them with a written list of these aggravating circumstances which they were authorized to consider. (T. 651). However, the trial court, did not give further specific instructions on the aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(7). It is the contention of the Respondent, this Court has never determined that any such further "limiting" instruction is an essential requirement when this aggravating circumstances is used to authorize the imposition of the death penalty.[1/]

1/ A review of the record reveals no request for any such "limiting instruction" by Petitioner's trial counsel.

Considering this allegation on direct appeal, the Supreme Court of Georgia considered this allegation, i.e., that the trial court's instructions to the jury in the sentencing phase of the trial must provide guidance in interpreting Ga. Code Ann. § 27-2534.1(b)(7) under the authority of Godfrey v. Georgia, 446 U.S. 420 (1980). However, the Supreme Court of Georgia properly found that, "while the trial court did not give a limited charge on § 27-2534.1(b)(7), we hold that a limited charge was not required under the facts of this case. Godfrey v. Georgia, supra; Hance v. State, supra; Cape v. State, supra." Solomon v. State, 247 Ga. 27, 34 (1981). Respondent contends that this finding, was clearly authorized under this Court's decision in Godfrey v. Georgia, supra.

The question which was decided in Godfrey v. Georgia, supra, was whether the Supreme Court of Georgia could be said to have applied a constitutional construction of a portion of the language contained in the aggravating circumstance set forth in Ga. Code Ann. § 27-2534.1(b)(7). This Court found the death sentences in that case to be invalid because there was no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.

In determining whether or not the Supreme Court of Georgia had applied a constitutional construction of a portion of the language contained in the seventh aggravating circumstance under Georgia law, this Court took into consideration numerous factors, one of which was the type of instructions which had been given to the jury. The major factor which this Court considered in determining whether Godfrey's death sentences were valid, was

the review of the death sentence, imposed pursuant to this aggravating circumstance, solely, by the Supreme Court of Georgia. This Court held that more needed to be stated by the Supreme Court of Georgia as to the evidence supporting the jury's § (b)(7) finding, than that the verdict was "factually substantiating." The review by the Supreme Court of Georgia in the instant case, is clearly distinguishable from that which it made of the aggravating circumstance in Godfrey v. Georgia, supra.

The sentence review portion of the Supreme Court of Georgia's opinion dealing with the sufficiency of the evidence to support the seventh aggravating circumstance is found in Solomon v. State, 247 Ga. 27, 33 (1981). Having reiterated certain portions of the trial testimony, the Supreme Court of Georgia concluded that there was sufficient evidence to support this circumstance, by stating the following:

> "By any rational standard, the murder was outrageously or wantonly vile, horrible or inhuman. It was the execution-style murder of an unarmed and wounded arm robbery victim. In this respect, this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. Hance v. State, supra; Godfrey v. Georgia, 446 U.S. ___ (100 S.Ct. 1759) 64 L.Ed.2d 398 (1980). The victim did not die instantaneously, but was subjected to a gunshot wound in order to force him to tell where the money was. Thereafter, he was subjected to multiple gunshot wounds which within themselves were not fatal until lying on the floor helpless he was executed with a single shot to the back of the head. The victim was not

related to either the Appellant or his co-defendant. He did not give any reason to assault him, nor was the victim subjecting them to any emotional trauma. The Appellant and his co-defendant attempted to hide the crime. See Godfrey v. Georgia, supra. We find the evidence factually substantiates and supports the finding of the two statutory aggravating circumstances and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra."

After reviewing this evidence and making this finding, the Supreme Court of Georgia then went on to hold that no limited charge was required under the facts of this case. Thus, the instant case, is distinguishable from Godfrey v. Georgia, supra, in which a further instruction to the jury might have been a factor which this Court found prevented the death sentences from being rendered invalid. Again, the type of instruction given to the jury, is only one factor in determining whether or not the imposition of the death sentence based on the seventh aggravating circumstance, is proper.

Of course, the instant case is also distinguishable from Godfrey v. Georgia, supra, as has previously been noted, there were two statutory aggravating circumstances utilized to impose the death penalty in the instant case. Further, while the jury in Godfrey v. Georgia, supra, only found that the murder was "outrageously or wantonly vile, horrible or inhuman," the jury in the instant case found the entire statutory aggravating

circumstance as contained in Ga. Code Ann. § 27-2534.1(b)(7).

In the context of this case as a whole, the Supreme Court of Georgia properly found that no limiting charge was necessary in order to constitutionally impose a sentence of death in the instant case. Therefore, this Court should deny the petition for writ of certiorari as to this issue.

B. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT PETITIONER'S SENTENCE OF DEATH FOR MURDER WAS NOT EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES.

It should first be noted that Petitioner admits on page 8 of his brief that this allegation has never been directly raised in the lower court. It is well-settled that this Court will not decide federal constitutional issues raised in this Court for the first time on review of state court decisions. See Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). See also Moore v. Illinois, 408 U.S. 786 (1972). The Supreme Court of Georgia did of course make the mandatory sentence review under Georgia statutory provisions and concluded that the sentence of death for murder in the instant case was not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant. See Solomon v. State, 247 Ga. 27, 34 (1981). However, the Supreme Court of Georgia did not specifically consider Petitioner's claim that before there is infliction of the death penalty, there must be a finding by the jury that Petitioner has taken live, attempted to take life, or intended to take life. Petitioner

argues that his constitutional rights were violated because he was sentenced to die without an express finding that he engaged in the conduct with a conscious purpose of producing death. Essentially, Petitioner is asserting that the death penalty cannot be imposed in a "non-triggerman" situation. However, the Petitioner's argument assumes that the evidence produced at trial was consistent with the finding that he did not act as a triggerman in causing the death of the victim, Roger Dennis Tackett. In fact, there was evidence consistent with the fact that the Petitioner fired at least one of the shots which caused a gunshot wound to the victim. As previously noted, the medical examiner's testimony revealed that there were five gunshot wounds to the victim, one in the head area, one in the jaw, one in the right hip, one in the right buttock, and a fifth on the victim's left thumb. (T. 456-457). The gun utilized by Mr. May, the Petitioner's co-indictee, had only been fired four times. State's evidence also showed that gunshot residue tests, performed on the Petitioner and co-indictee May, indicated that both men had fired shots from the guns found at the scene of the crimes. (T. 444-446). Two guns had been found at the scene of the murder, located next to the body of the victim, one of them being the Petitioner's Smith and Wesson. (T. 273). Therefore, the instant case presents not a "non-triggerman" situation, but rather equal participation by the Petitioner and his co-indictee as to the armed robbery and the murder, with the only question being which of the five gunshot wounds actually caused the death of the victim.

It can also be argued that the jury was authorized, under the evidence presented at trial, to believe that the Petitioner was the "prime mover," even in light of his testimony that he acted on May's instructions. As the prosecuting attorney stated

in closing argument, "Van Solomon has got to be the man who knew what was going on and was in control. His van, his burglary tools, his gun. Never said a word about, first, speak up to the police." (T. 540).

The trial court recognized Petitioner's defense of "coercion" by his co-indictee and charged the jury on this contention. (T. 557). However, the jury was properly charged that, "no one who delivers a fatal wound resulting in a homicide is excused from the commission of such murder by a contention that he was coerced. However, one is not guilty of murder if he did not deliver the fatal blow, but aided and abetted the slayer only because of a reasonable or present and immediate fear of death or great violence to himself. (T. 557-558).

Therefore, the question was squarely presented to the jury and the jury, in convicting the Petitioner of murder, clearly believed on the evidence presented at trial, that the Petitioner had not been coerced, and that he had directly participated in the armed robbery and that his acts, together with those of Mr. May, had directly led to the victim's death. Therefore, even if Petitioner's premise is accepted for the sake of argument, this is a case in which the Petitioner himself is implicated in the murder and is not a case in which the death penalty is imposed for a "non-triggerman."

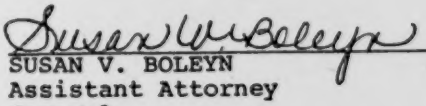
In any event, Coker v. Georgia, 433 U.S. 584, 598 (1977), cited by the Petitioner, merely stands for the proposition, that the death penalty should not be imposed for the offense of rape, as long as the rapist does not himself take the life of his victim. Coker v. Georgia, supra, does not support Petitioner's argument, that it is only when a person has taken the life, attempted to take life, or intended to take life, that the death

penalty can be imposed upon him. Simply stated, Coker v. Georgia, supra, does not deal with the "non-triggerman" type situation. As Petitioner has noted, the full court has not dealt with this issue or taken Coker v. Georgia, supra to this extent, except for perhaps Justice White in his concurring opinion in Lockett v. Ohio, 438 U.S. 586, 627-68. The Respondent respectfully submits that should this Court ever reach this question, it should not be in this case, as this case does not present the classic "non-triggerman" situation, but rather is a situation in which the Petitioner directly participated in the armed robbery and the murder of the victim. Therefore, this Court should decline to grant a petition for writ of certiorari to reach a question not raised in the instant case and raised for the first time before this Court.

CONCLUSION

For all of the above and foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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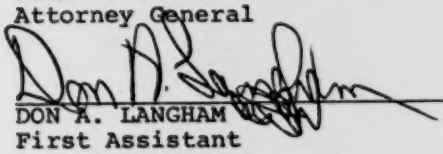

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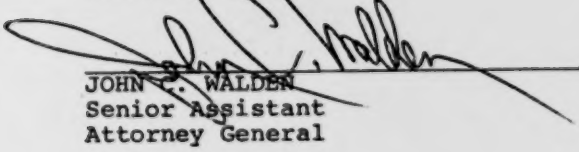

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